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No. 04-340

Supreme Court, U.S.
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In The Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T & R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review to decide whether a federal court should apply the Full Faith and Credit Act, 28 U.S.C. § 1738, to preclude relitigation of a regulatory takings claim after a state court has issued a final judgment on the merits of the identical claim.

2. Whether this Court should grant review to decide whether heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* applies to legislation requiring the payment of a development impact fee that applies equally to a broad class of property owners.

CORRECTION OF MISSTATEMENT IN PETITION OF QUESTIONS PRESENTED

Astonishingly, petitioners' first question fails to include any reference to the Full Faith and Credit Act, 28 U.S.C. § 1738, the primary basis for the Ninth Circuit's application of issue preclusion to petitioners' takings claims.

Petitioners' first question also assumes that petitioners involuntarily filed their takings claims in state court. To the contrary, petitioners initially filed their takings claims in federal court. Following judgment against them in the district court, petitioners, for the first time, asked the Ninth Circuit to reverse and send the entire case to state court under the abstention doctrine of *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). The Ninth Circuit ordered the district court to abstain from adjudicating petitioners' facial takings claim. Accordingly, petitioners did not involuntarily litigate their takings claims in state court.

Finally, the prologue to petitioners' questions for review misrepresents that the City's ordinance "prohibited hotels from continuing their historic, duly-licensed operation as hotels." In fact the opposite is true – the ordinance allowed the continuation of the historic use of the affected hotels.

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STATEMENT OF THE CASE

The petition should be denied because the decision below is consistent with the decisions of this Court and raises no important question of law. Petitioners filed this action challenging the City's Residential Hotel Unit Conversion and Demolition Ordinance ("HCO") 12 years after the City enacted the ordinance. Under the applicable one-year statute of limitations, the district court found that this action is time-barred. Because the case was properly dismissed on this independent ground, the Court should decline review of the questions presented in the petition.

Petitioners also seek a determination that a takings claimant may litigate its takings claims in state court, and if unsuccessful in that forum, relitigate the identical takings claims in federal court. Petitioners contend that the federal court should give their takings claims de novo review, even where the facts and applicable law of the federal and state claims are identical.

Not only is there no conflict on this issue, but it is difficult to conceive of a more wasteful and unfair system for resolving a legal dispute. Granting every takings claimant two bites at the judicial apple would further burden cash-strapped public agencies with duplicative litigation and deluge the federal courts with local zoning disputes. In the Full Faith and Credit Act, 28 U.S.C. § 1738, a central component of the doctrine of federalism, Congress determined that federal courts should not serve as general courts of appeal for state court actions. The petition ignores the inefficiencies that would result if all takings claimants were awarded two separate opportunities to litigate an identical claim.

The petition is also remarkable for its failure to cite either the Full Faith and Credit Act or *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*"Dodd I"*), 136 F.3d 1219 (9th Cir. 1998) (*"Dodd II"*), the cornerstones of the Ninth Circuit's opinion. Where petitioners conceal the central legal basis for the lower court decision and fail even to cite federal statute and caselaw that undermine their position, this Court cannot reasonably expect that granting review here would lead to a fair and thorough development of the issues.

Petitioners further contend that the lower courts incorrectly declined to apply heightened judicial scrutiny to the HCO under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Review on this question would be unwarranted because there is no conflict on this issue. The Takings Clause does not apply to a generalized obligation to pay money, such as the impact fee at issue. *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring and dissenting); *id.* at 554-55 (Breyer, J., dissenting). Even if the Court disagrees, in *Nollan*, *Dolan*, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), this Court drew a sharp distinction between unique, adjudicatory exactions imposed on individual property owners and generally applicable, legislative regulation. In the former, the Court held, a higher level of judicial scrutiny may be justified. In the latter case, however, the Court indicated that deferential review is the applicable standard. The HCO is a generally applicable legislative regulation. In applying deferential review to the HCO, the lower courts were faithful to this Court's consistent pronouncements on this issue. The Court should deny review.

A. Statement of Facts.

The Petition misrepresents the facts. The correct facts are as set forth in the decision of the California Supreme Court in *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) (*"San Remo II"*). Appendix to Petition ("App.") E at 108a-121a.[1]

1. The Hotel Conversion Ordinance.

In the years preceding the enactment of the HCO, the City faced a growing loss of rental housing. HCO, S.F. Admin. Code § 41.3.[2] One major reason for this loss was the increasing conversion of residential hotel units to tourist use. § 41.3. After years of study, in 1979, the City adopted the temporary HCO, and in 1981, adopted a permanent ordinance:

> to benefit the general public by minimizing adverse impacts on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. § 41.2.

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[1] Petitioners contend that because this case was decided on a motion to dismiss, the Court should accept the facts petitioners allege in their complaint as true. Petition at 2 n.1. To the contrary, under the Full Faith and Credit Act, the California Supreme Court's findings of fact are binding on the federal courts. *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (collateral estoppel prevents federal court relitigation of issue of fact adjudicated in state court); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120-22 (1992) (in regulatory takings case, Supreme Court defers to factual findings of state court).

[2] Unless otherwise indicated, all statutory references are to the HCO. The text of the HCO is set forth in Appendix F to the Petition.

The HCO requires residential hotel owners to continue the historic use of their hotels. At the time of its enactment in 1981, the HCO required each hotel in San Francisco to report the number of residential and tourist units in the hotel as of September 23, 1979. §§ 41.4(q), 41.6. Based on the information provided by the hotel, the City issued a Certificate of Use, which specified the legal use of the property and certified the number of residential and tourist units in the hotel. § 41.6(d).

The HCO balances the rights of residential hotel owners and tenants by allowing owners unlimited tourist use of rooms that were used for tourists in 1979, and tourist use of residential rooms during the summer tourist season, May through September. Residential rooms must revert to residential use during the winter, however, when tourism falls off. § 41.19(a)(2).

The City's Department of Building Inspection ("DBI") administers the HCO. §§ 41.11-15. While DBI is authorized to maintain records of residential hotels and to enforce the ordinance, DBI has no discretion to apply the HCO to a residential hotel on a case-by-case basis. App. E at 137a-138a.

Under the HCO, an owner can convert residential hotel units to non-residential use if the owner replaces the converted residential units. An owner may provide replacement housing by building new units. Alternatively, to assist in the construction of replacement units, an owner may contribute an in lieu fee to the City's Residential Hotel Preservation Fund equal to the land cost and a fixed percentage of the construction cost of the converted units. §§ 41.12-13. The formula for the in lieu fee applies equally to every residential hotel subject to the HCO. *Id.* DBI has

no discretion to vary the amount of replacement housing provided or the amount of the in lieu fee. *Id.* The HCO applies to 500 residential hotels containing more than 18,000 units. § 41.3(d); App. E 139a n.12, 150a.

In May 1990, the City reenacted the HCO "in slightly modified form." *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482, 1484 (9th Cir. 1994), *aff'd after remand*, 76 F.3d 386 (9th Cir. 1996), *cert. denied*, 519 U.S. 808. The amendment increased the replacement fee from 40% of construction costs to 80%. § 41.13(a)(5). The 1990 HCO also imposed further restrictions on rental of tourist units in the summer. In order to rent more than 25% of residential rooms to tourists in the summer, a hotel was required to make good faith efforts to rent residential rooms during the winter. § 41.19; App. E at 111a.

2. The San Remo Hotel.

In 1981, petitioners reported to the City that the San Remo had 61 residential units and 0 tourist units on September 23, 1979.[3] App. E at 114a. Based on petitioners' own report, the City confirmed the number of residential units in the San Remo in a Certificate of Use. *Id.* Petitioners did not challenge the City's classification under the procedures provided by the HCO, and the Certificate of Use became final. *Id.*; *see also* § 41.6(f).

Petitioners misrepresent that the HCO prevented the continuation of the San Remo's historic use as a tourist

[3] In the mid 1980's, petitioners notified DBI that the San Remo in fact contained 62 residential units rather than 61.

hotel. Contrary to petitioners' claim that the San Remo "has been operated as a tourist hotel since the 1950s," the San Remo's historic use was primarily, if not exclusively, as a residential hotel. *See* JERRY F. SCHIMMEL, SAN REMO HOTEL 1906-1976, HISTORICAL RESOURCE MANUAL 5-16 (1998). As of September 1979, the San Remo Hotel was in 100% residential use. App. E at 114a. The California Supreme Court and the district court rejected petitioners' claim that petitioners' own 100% residential use designation was a mistake. App. E at 152a-153a n.17; App. D at 56a-57a. Accordingly, the HCO required petitioners merely to continue their historic use of the San Remo as a residential hotel, but relaxed even that requirement for the five summer months of each year, allowing greater tourist use than had recently occurred.[4]

Petitioners further misrepresent that the 1990 amendments to the HCO "severely restricted petitioners' operation of the hotel." Pet. at 3. In fact, the change had no effect on the San Remo. Petitioners applied for and

[4] Petitioners' statement that the San Remo "was fully-licensed as a tourist hotel" in 1971 is misleading. Before the City enacted the HCO in 1979, DBI did not distinguish between tourist and residential hotel units: DBI licensed both uses as "hotel." Similarly, when DBI issued a new license to petitioners in 1976, the license did not distinguish between tourist and residential hotel use. Petitioners' statement that the City "collected hotel taxes based on the tourist use of the hotel," insofar as it creates the impression that the San Remo was primarily a tourist hotel, is also misleading. Hotel taxes were due for any temporary tourist use of residential rooms. The HCO allowed summer tourist rentals of the San Remo's 62 residential rooms, as long as the rooms reverted to residential use during the winter. § 41.19(a)(2).

received approval from the City for 100% summer tourist rentals for each year following the 1990 amendments until petitioners converted the San Remo to a tourist hotel in 1993. App. D at 78a n.13; App. E at 116a. The 1990 HCO also allowed owners who filed an application for a permit to convert before the June 1990 effective date of the 1990 HCO to elect the 40% replacement housing payment rather than the new 80% fee. § 41.13(d); App. E at 110a n.3.

On May 11, 1990, petitioners invoked the 40% grandfathering provision of the 1990 HCO and filed an application under the HCO for a permit to convert all 62 residential units to permanent tourist use. App. D at 59a. Under the HCO's formula for the in lieu fee, petitioners were required to pay $567,000 to replace 40% of the affordable housing lost as a result of the conversion.[5]

Although petitioners had failed to pay the replacement housing fee, they nevertheless converted the San Remo to permanent tourist use in September 1993 and sued the City. *See* App. D at 62a. On December 11, 1996,

[5] Petitioners misrepresent that the fee resulted from an action of the San Francisco Planning Commission in an adjudicatory proceeding. To the contrary, the City's legislature, in adopting the HCO, imposed the fee by legislated formula. The Planning Commission merely recited the fee in its approval of the San Remo's conversion under the City Planning Code, a separate ordinance. As the California Supreme Court held: "[T]he dissent's claim that 'the planning commission chose to . . . exact a $567,000 fee' misrepresents the facts. . . . In their application for a conditional use permit, plaintiffs – who had already applied for a conversion permit under the HCO – assured the planning commission that they would comply with the HCO. The commission incorporated that assurance as a condition of the [conditional use] permit, *but did not itself assess any fee*." App. E at 129a, emphasis original, citations omitted.

petitioners paid the fee under protest. *Id.* at 67a. On March 6, 1997, the City issued a conversion permit under the HCO allowing petitioners to use all 62 of their rooms for permanent tourist use.[6]

B. Procedural History.

The procedural history of this case presents an example of blatant forum-shopping. Each time petitioners faced rejection of their takings claims, they managed to resurrect their claims in another forum. In this federal court action, San Remo seeks not a second bite at the apple, but a third.

1. *San Remo I.*

In May 1993, petitioners filed this action in U.S. District Court *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) (*"San Remo I"*) and related it to another case before Judge John Vukasin, *Golden Gate Hotel Ass'n v. City and County of San Francisco*. *See Golden Gate*, 18 F.3d 1482; App. D at 61a. Petitioners did so because Judge Vukasin expressed the view early in the *Golden Gate* case that the HCO is unconstitutional.

On September 16, 1993, Judge Vukasin found the HCO unconstitutional on its face in *Golden Gate*. At the same time, Judge Vukasin granted petitioners' motion for

[6] Although petitioners had converted the San Remo to a permanent tourist hotel in 1993, the City did not require interest on the fee for the 3½-year period during which the San Remo had been operating illegally as a tourist hotel.

a preliminary injunction enjoining the City from enforcing the HCO to prevent year-round tourist use of all 62 rooms in the San Remo. App. D at 62a.

Subsequent developments in the courts completely eroded the basis for Judge Vukasin's preliminary injunction. *Id.* at 63a. In March 1994, the Ninth Circuit vacated, reversed, and remanded Judge Vukasin's decision in *Golden Gate*, ordering the district court to consider the statute of limitations. *Id.*; *Golden Gate*, 18 F.3d at 1487. Judge Vukasin had died in the interim, and, on remand, *Golden Gate* was assigned to District Judge D. Lowell Jensen. Judge Jensen entered judgment for the City in *Golden Gate*, finding that the facial takings challenge to the HCO was barred by the one-year statute of limitations. The Ninth Circuit affirmed. 76 F.3d 386.

On August 26, 1997, Judge Jensen rejected each of Judge Vukasin's earlier rulings in the instant case, granted summary judgment to the City, and dissolved the preliminary injunction. *See San Remo I*, 145 F.3d at 1100; App. D at 66a. Petitioners appealed the district court's ruling. Despite having chosen the federal forum to prosecute their takings claim, petitioners argued on appeal, for the first time, that the district court should have declined to entertain their takings claims and abstained in favor of a state court adjudication. *See San Remo I*, 145 F.3d at 1104-05. Despite expressing "some sympathy" for the City's claim that petitioners were forum-shopping, and noting that "as a matter of the responsible conduct of litigation, a party desiring to raise abstention will normally seek it first in the district court," the Ninth Circuit nevertheless ordered abstention as to petitioners' facial takings claim. *Id.* The Ninth Circuit concluded that petitioners' as-applied takings claim was not ripe for

adjudication in federal court. *Id.* at 1102. The court affirmed the judgment for the City as to petitioners' due process and equal protection challenges to the HCO. *Id.* at 1101, 1103.

2. *San Remo II.*

Following *San Remo I*, petitioners filed their facial and as-applied takings claims in the California Superior Court. App. D at 67a. The Superior Court granted judgment to the City on petitioners' takings claims. The Court of Appeal reversed. The California Supreme Court granted review. *Id.* at 68a. On March 4, 2002, the Supreme Court issued its decision in favor of the City on all issues. *Id.*; App. D.

The California Supreme Court rejected petitioners' claim that the HCO's requirement that they pay a fee to convert to a permanent tourist hotel "does not substantially advance legitimate state interests." App. D at 144a-155a. The Court held that: (1) "housing replacement fees assessed under the HCO are not subject to [heightened] scrutiny," *id.* at 140a; (2) petitioners were required to show that there is no "reasonable relationship" between the conversion of the San Remo to permanent tourist hotel use and the mitigation fee, *id.* at 141a-142a & n.13; and (3) because the fee is "measured by the resulting loss of housing units, . . . [it] was thus reasonably related to the impacts of plaintiffs' proposed change in use" and did not effect a taking. *Id.* at 155a. Although the court stated that it was not deciding petitioners' federal takings claims, the court applied the federal law of takings throughout its opinion and emphasized that California and federal takings law are coextensive. *Id.* at 130a-131a.

3. *San Remo III.*

On June 4, 2002, petitioners refiled their takings claims in the district court. In the second version of this federal action, petitioners alleged takings claims identical to those they had asserted in state court. App. D. at 96a. ("In this case, San Remo is arguing a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts."). The district court dismissed petitioners' facial and as-applied claims as time-barred, with the exception of petitioners' as-applied takings challenge to the City Planning Code.[7] The district court further concluded that it was required to defer to the rulings of the California Supreme Court under the Act. Accordingly, the court applied issue preclusion to bar each of petitioners' takings claims. *Id.* at 104a-105a, App. C at 50a. Although it did not reach the merits, the district court indicated that, were it to rule on the merits, it would agree with the California Supreme Court and find in favor of the City, on the ground that the HCO "substantially advances a legitimate government interest" and does not effect a taking under any other takings test. App. D at 101a-103a.

Finding that San Remo's state and federal takings claims were identical, the Ninth Circuit affirmed under the Full Faith and Credit Act and the issue preclusion doctrine. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) ("*San Remo III*") App. A at 17a-21a. The Ninth Circuit did not reach the statute of limitations issue.

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[7] The petition challenges the HCO only. It does not raise a takings challenge to the Planning Code.

REASONS THE PETITION SHOULD BE DENIED

I. PETITIONERS' TAKINGS CLAIMS ARE TIME-BARRED.

Because this action is time-barred, the Court need not reach the questions raised in the petition. At the time petitioners filed this action in 1993, the applicable statute of limitations in California for claims against local government agencies under the Takings Clause of the Fifth Amendment was one year. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (O'Connor, J., dissenting); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). The City enacted the HCO in 1981. A facial takings challenge to legislation accrues immediately upon enactment of the statute. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). Accordingly, petitioners' action, filed in 1993, was 11 years too late. Even if the enactment date of the HCO is deemed to be the 1990 amendments, petitioners' facial challenge, filed three years later, was untimely.

The as-applied challenge is likewise time-barred. The district court concluded that petitioners' challenge to the HCO was in fact a facial challenge because petitioners attacked the basic policy underlying the HCO. *See also*, App. C at 77a (plaintiffs allege that both 1981 and 1990 HCOs require plaintiffs to "bear the public burden of housing the poor"); App. D at 82a n.14; App. E at 147a n.16 ("[P]laintiffs' challenge [is] not to the housing replacement fee, or to any other exaction made as a condition of permit approval, but to the City's underlying reasons for restricting residential hotel conversion."). That policy had been consistently applicable to the San Remo since 1981. *See, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993) (where alleged injury arises solely from existence of

statute itself, challenge is facial). Accordingly, petitioners' takings claim, filed under the guise of an as-applied claim, was also filed 11 years too late.

II. THERE IS NO CONFLICT REGARDING THE APPLICATION OF THE FULL FAITH AND CREDIT ACT TO BAR RELITIGATION OF TAKINGS CLAIMS IN FEDERAL COURT WHERE THE STATE COURT HAS ALREADY ADJUDICATED IDENTICAL CLAIMS.

The Ninth Circuit applied the Full Faith and Credit Act to bar petitioners' takings claims. That decision is fully consistent with the decisions of this Court and federal statute. The Full Faith and Credit Act requires federal courts to give both issue and claim preclusive effect to earlier state court judgments. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-85 (1984); *see also Allen v. McCurry*, 449 U.S. at 94 (Claim and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

Under issue preclusion, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on a same or a different claim." *Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). Contrary to petitioners' argument, a takings claimant has no absolute entitlement to a federal forum for their claims:

> [N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its

> proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. *Allen*, 449 U.S. at 103-04, footnotes and citation omitted.

Here, the Ninth Circuit correctly found that petitioners' federal takings claims are barred under the issue preclusion doctrine. First, petitioners' state and federal claims are identical. In both state and federal courts, petitioners alleged that the HCO works a taking under the "substantially advance" test of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In applying this test, petitioners argued, courts should impose heightened scrutiny on the City's ordinance under *Nollan* and *Dolan*. In addition, petitioners alleged that the HCO works a taking under the "mutli-pronged test established by *Penn Central Trans. Co. v. New York City,* 438 U.S. 104 (1978)." Excerpts of Record ("ER") 43; *see also* ER 178; *compare* ER 43, 45-47 (Second Am. Cplt. in federal court) *with* Supp. Excerpts of Record 57-62 (Second Am. Cplt. in state court).

Second, the applicable law is identical. The *San Remo II* Court observed that it construes the Takings Clauses of the United States and California Constitutions "congruently." App. E at 130a; *see also Hensler v. City of Glendale*, 8 Cal.4th 1, 9 n.4 (1994) ("Our conclusion that the prerequisites to an inverse condemnation action arising out of a regulatory taking do not deny landowners any rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution applies equally to rights claimed under article I, section 19 [Takings Clause of California Constitution]"). The district court and the Ninth Circuit also found that California and federal substantive takings law is equivalent. App. D at 91a-94a; App. A at 19a-20a.

Petitioners contend that the Ninth Circuit's application of issue preclusion to takings claims previously litigated in state court conflicts with the decisions of other circuit courts. No split exists to warrant review.

Petitioners principally rely on the recent Second Circuit opinion in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003), *cert. denied on other grounds*, 125 S.Ct. 104 (2004). *Santini* concludes that issue preclusion does not apply to federal takings claims following involuntary litigation of the same claims in state court. *Id.* at 128. The *Santini* Court, like petitioners here, did not consider, *or even mention*, the Full Faith and Credit Act. Because *Santini* did not address the Act, it is not in direct conflict with the Ninth Circuit decisions in *Dodd* and *San Remo III*.

Moreover, *Santini* does not conflict with *San Remo III* because, unlike the claimant in *Santini*, petitioners here were not involuntary litigants in state court. On appeal from the district court's judgment in *San Remo I*, *petitioners* asked the Ninth Circuit to reverse and order the district court to send their facial takings claim to state court under *Pullman*, over the City's objection. *San Remo I*, 145 F.3d at 1104-05. Petitioners stated in their Opening Brief in the Ninth Circuit in *San Remo I*: "THIS COURT SHOULD ORDER ABSTENTION UNDER *PULLMAN* TO ALLOW THE STATE COURTS TO RESOLVE DISPUTED ISSUES OF STATE LAW." Appellant's Opening Brief filed Jan. 13, 1997 at 18. Petitioners argued that the case met all of the elements for *Pullman* abstention, *id.* at 20-21,

and that abstention was "required." *Id.* at 19.[8] Accordingly, petitioners could have litigated their takings claims in the federal forum had they not voluntarily moved the case to state court over the City's objection. To allow petitioners to relitigate in this Court the same takings claim raising the same issues of law and fact that the California Supreme Court has already rejected would unfairly penalize the City and reward petitioners for forum-shopping.

Whether petitioners' litigation in state court was voluntary or involuntarily is ultimately inconsequential, however, because issue preclusion applies regardless of the reason for the prior state court litigation. Whether the claimant voluntarily initiates the action in state court is not an element of the Full Faith and Credit Act. It makes no difference that the plaintiff's forum for litigating the claim was imposed upon him.

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all. *Allen*, 449 U.S. at 104.

This Court need not grant review to reverse *Santini*, where that court failed to address relevant federal statute.[9]

[8] In the Ninth Circuit, a challenge to regulation on the basis that it fails to substantially advance legitimate state interests on its face may be filed in federal court in the first instance, without exhausting the state remedy. *San Remo I*, 145 F.3d at 1102.

[9] Because the government was the prevailing party in *Santini*, it had no incentive to petition for rehearing or rehearing en banc to request that the court consider the Act, nor did the government have any interest in raising this issue in a petitioning for certiorari.

Indeed, no court has followed the poorly reasoned *Santini* opinion. With the exception of *Santini*, every circuit court that has addressed issue preclusion agrees with the Ninth Circuit. *See Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) ("Where a party has been afforded a full and fair hearing in state court, section 1983 does not allow relitigation of the same issues in federal court 'simply because the state court's decision may have been erroneous.'"); *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1324 (10th Cir. 1998) ("We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case.").[10]

Petitioners misrepresent that the Fourth, Fifth, and Eleventh Circuits "agree" with *Santini*, relying on *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 282-84 (4th Cir. 1998), *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303-09 (11th Cir. 1992), and *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976). Petitioners are wrong again. Similar to the Ninth Circuit, the courts in each of these cases declined to apply *claim preclusion* to bar litigation of federal takings claims in federal court following state court litigation. The cases do not, however, address the Full Faith and Credit Act's requirement that federal courts apply *issue preclusion* to state court adjudications of takings claims. Thus, they do not conflict with the rule in the Third, Ninth, and Tenth Circuits.

[10] *Santini* is not only poorly reasoned, it is also a recent decision. This Court should deny review to allow the federal circuit courts the opportunity to apply the Full Faith and Credit Act to takings claims previously litigated in state court.

And contrary to petitioners' contention, takings claimants are not denied a federal forum for their takings claims in every instance. Issue preclusion bars a federal takings claim only where the federal claim is identical to a state claim litigated to a final judgment in state court. Petitioners fail to point out that where the federal and state claims differ, the federal court will adjudicate issues that the state court has not already decided. *Dodd I*, 59 F.3d at 852; *Dodd II*, 136 F.3d at 1228 (Because Oregon takings law does not recognize *Penn Central* multi-factor test for a taking, claimant allowed to litigate issue in federal court).

Petitioners provide no rationale for permitting regulatory takings claimants two bites at the apple, while limiting other constitutional claimants to a single opportunity to litigate. The policy petitioners advocate would flood the already overburdened federal courts with takings litigation. Finally, the requirement that local governments litigate takings claims twice, in two different court systems, would impose a crippling financial burden on already severely stressed local public agencies, compelling the reallocation of resources from vital services, such as police and fire protection, education, and health care. It is hard to imagine a more wasteful policy.

III. THERE IS NO CONFLICT REGARDING THE APPLICATION OF A DEFERENTIAL STANDARD OF REVIEW TO GENERALLY APPLICABLE REGULATIONS CHALLENGED UNDER THE SUBSTANTIALLY ADVANCE TEST.

Petitioners also request review of the lower court's conclusion that deferential review applies under a substantially advance challenge to the HCO. The Ninth Circuit's holding is fully consistent with the rulings of this

Court and every federal circuit and state supreme court to address the issue. There is no conflict on this issue, and review is not warranted.

Although the legitimacy of the substantially advance test is uncertain, *see Eastern Enterprises*, 524 U.S. at 545 (Kennedy, J., concurring and dissenting); *id.* at 554 (Breyer, J., dissenting),[11] in any event, five Justices of this Court found that the Takings Clause of the United States Constitution simply does not apply to fees or other obligations to pay money. *Id.* at 540 (Kennedy, J., concurring and dissenting) (monetary obligation is not "specific property interest" subject to takings analysis); *id.* at 554-55 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.) (same); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority."); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

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[11] The validity of the substantially advance test as a takings test independent of the due process clause is before the Court in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001), *aff'd sub nom., Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom., Lingle v. Chevron U.S.A., Inc.*, No. 04-163 (Oct. 12, 2004). Given that no conflict exists regarding the standard of judicial review of generally applicable regulations, the Court need not grant review to decide the legitimacy of the substantially advance test.

Moreover, "heightened scrutiny" is limited to "exactions" imposed on a case-by-case basis – where the government conditions approval on the owner's dedication of land to the public to offset the impact of the proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385-86. This Court and the lower federal courts are unanimous that deferential review applies to legislative regulations and conditions of approval that do not require the dedication of a possessory interest in land. The rationale for this rule is twofold. First, while ad hoc conditions of approval involve discretionary decision-making on individual projects, ordinary zoning does not; rather, it "involves essentially legislative determinations classifying entire areas of the city." *Dolan*, 512 U.S. at 385. As to legislative land use classifications, such as the HCO, the Court has indicated that a deferential standard continues to apply. *Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 385.

Second, heightened scrutiny is appropriate for exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *id.* at 841 ("We are inclined to be particularly careful about the adjective ["substantial"] where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."). Dedications of land, however, are entirely different from the ordinary regulation of land use. *See id.* at 834-35 (citing cases involving land use regulation for the proposition that "a broad range of governmental purposes and regulations" of land use have been upheld); *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations

discussed in [*Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926), *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and *Agins*] . . . differ in [that] the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."). The Court confirmed that point of view most recently in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1992), where the Court held that heightened scrutiny is not appropriate for regulations that do not require the property owner to dedicate a physical interest in land to the public. The Court stated:

> [W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. 526 U.S. at 702.

Heightened scrutiny does not apply here because the HCO does not effect a physical taking.

The circuit courts are unanimous that heightened scrutiny is limited to ad hoc exactions of physical interests in land. *Commercial Builders of Northern Cal. v. City of Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (applying deferential test rather than heightened scrutiny to uphold generally applicable development impact fee); *Hotel & Motel Assoc. of Oakland v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (applying deferential "reasonable relationship" test to reject "substantially advances" challenge to habitability requirements for hotels); *Garneau v. City of Seattle*, 147 F.3d 802, 811-812 (9th Cir. 1998); *id.* at 820 (Williams, J., concurring) (noting history of judicial deference to generally applicable fees "resulting from legislative . . .

processes"); *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (heightened scrutiny not applicable to zoning regulation that does not compel a physical invasion); *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny inapplicable to hunting license scheme because regulation not a "physical taking or its equivalent").[12]

Petitioners rely on *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989), to suggest that courts are divided on the standard of judicial review of legislative regulation for takings. In that case, the New York court struck down an ordinance that required owners of residential hotels to rent units to homeless persons. The court found that the ordinance forced rentals and thus effected a physical taking. The court also applied heightened scrutiny to find that the ordinance failed to substantially advance legitimate state interests. 542 N.E.2d at 1068-69. Petitioners' reliance on *Seawall* is misplaced.

The HCO does not require landlords to rent any units. Vacancy does not violate the ordinance. *See* § 41.19. Accordingly, the HCO does not compel property owners to submit to occupation of their property by others and does not constitute a physical taking. *See Yee*

[12] The only federal decision after *Del Monte Dunes* to apply heightened scrutiny to a regulation that does not exact a possessory interest in land is *Lingle v. Chevron*, scheduled for hearing this term. *See* n.11, *supra*, at p. 19.

v. City of Escondido, 503 U.S. 519, 527 (1992) (finding that a physical taking requires forced occupation). The district court agreed. App. 102a. Moreover, insofar as the *Seawall* Court applied heightened scrutiny to a legislative regulation of general application, the New York Court of Appeals expressly overruled *Seawall* in *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 975 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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